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RUEHYN/AMEMBASSY SANAA PRIORITY 0500
RHMFIUU/CJTF HOA PRIORITY
RUEAWJA/DOJ WASHDC PRIORITY
RULSDMK/DOT WASHDC PRIORITY
RHMFIUU/CDR USCENCOM MACDILL AFB FL PRIORITY
RUZEFAA/CDR USAFRICOM STUTTGART GE PRIORITY
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UNCLAS SECTION 01 OF 04 NAIROBI 002869

SIPDIS

AF/RSA FOR MIKE BITTRICK AND JUN BANDO, AF/E FOR SUSAN
DRIANO, S/CT, INL FOR SILENSKY, L FOR ASH ROACH AND JOHN
DALEY, DOJ/OPDAT FOR ALEXANDER, BERMAN, SILVERWOOD,
KALASHNIKOVA, DOJ FOR CRIM DAAG SWARTZ

E.O. 12958: N/A

TAGS: [PREL](#) [PGOV](#) [ASEC](#) [PHSA](#) [MOPS](#) [KCRM](#) [KJUS](#) [SO](#) [YM](#) [DA](#)

UK, KE

SUBJECT: UPDATE ON KENYAN PROSECUTION OF SUSPECTED SOMALI
PIRATES

REF: A. STATE 133493

[B](#). DALEY EMAIL 12/22/2008

[C](#). NAIROBI 2686

[1](#). This is an action message. Action recommendations and
requests are at paragraphs 7, 8, 9, 12, and 16.

[2](#). Summary: On December 11, the eight Somali nationals
charged with piracy again appeared before a magistrate judge
in Mombasa. The prosecutors asked the magistrate to postpone
the trial to give them more time to prepare, and the judge
set the trial date for January 14, 2009. The Somalis were
seized by the United Kingdom's Royal Navy on November 11
after they were observed committing acts of piracy in
international waters off the coast of Yemen, and were later
turned over to Kenyan law enforcement authorities in Mombasa.
It appears that, contrary to initial information provided
(ref C), the defendants may also be charged with attempted
piracy (of the Danish ship, "Powerful") under Kenya's general
criminal attempt statute. End summary.

[3](#). The U.S. Department of Justice's Resident Legal Advisor
(RLA) in Nairobi has been asked by the Department of Public
Prosecutions (DPP, the Kenyan prosecutor's office) to provide
further support for this and future piracy prosecutions. (The
former RLA assisted with Kenya's first (and only, until now)
piracy prosecution in 2006.) The RLA has met several times
with prosecutors to discuss the case, outline strategies and
provide guidance and support. The RLA also assisted in
coordinating the transfer of evidence and information from
the Royal Navy and the British High Commission to the DPP.
The RLA coordinated a meeting in Nairobi on December 10 with
Kenyan law enforcement and prosecutors, and officials from
the British High Commission and Royal Navy who were involved
in the transfer of the suspected pirates to the Kenyan
authorities. The parties exchanged information about the
case, reviewed procedural and evidentiary issues, and
discussed the government of Kenya's (GOK) need for logistical
support in transporting relevant foreign witnesses. The UK
Royal Navy Commander who attended the meeting is coordinating
with his U.S. Navy JAG counterparts in Bahrain. The UK
representative and DPP have agreed in principle to the RLA's

proposal to host several substantive workshops on the issues involved in prosecuting these cases.

UK, KENYA SIGN PIRACY MEMORANDUM, WORK TO STANDARDIZE PROCEDURES

¶4. Following its recent consultations with the GOK, the Royal Navy is now drafting standard operating procedures (SOPs) for naval personnel who take suspected pirates into custody with the intention of transferring them to Kenya. The Royal Navy will send a draft of these SOPs to the RLA and DPP for comment. The purpose of the proposed SOPs is to standardize the investigation, arrest, evidence collection, and prisoner transfer procedures prior to transfer to Kenyan authorities. On December 11, the United Kingdom (UK) and the GOK signed a memorandum of understanding (MOU) that provides for the future transfer of suspected pirates captured by the Royal Navy to Kenyan authorities. The UK provided the United States with a copy of the MOU, which is being reviewed by L. The EU is also negotiating a similar document with Kenya, although it is in the form of an agreement. Post has received refs A and B, which propose a U.S.-Kenyan MOU, and is preparing to demarche the GOK at the earliest opportunity.

GOK SEEKS HELP FOR YEMEN INVESTIGATION

¶5. The GOK was considering sending investigators to Yemen to obtain more detailed statements from the Yemeni crew of the dhow that was initially taken over by the defendants. (Note: The defendants took control of the dhow on November 8, and used it as a base from which to launch attacks on larger

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merchant vessels over a three-day period. The suspects were captured by the Royal Navy after their failed attempt to take over the Danish merchant ship "Powerful." End note.) However, officials are now reconsidering the necessity of this travel in view of the time constraints imposed by the trial date and the costs of the proposed travel. It may be sufficient for the DPP to interview the Yemeni witnesses in Kenya before the trial begins. The Kenyans may request logistical support from the UK to locate the Royal Navy personnel who were involved in the capture of the suspects, and will need assistance in locating the witnesses who were on board the Yemeni vessel and arranging for their travel to and trial testimony in Mombasa.

PIRATES MAY BE CHARGED WITH ATTEMPT

¶6. Prosecutors initially stated that the Kenyan criminal code did not include a general attempt provision that would permit prosecution for attempted piracy. This is incorrect, and the RLA has suggested that the DPP amend the criminal charges against the defendants to include a charge for the attempted piracy of the Danish vessel. If the prosecution decides to put on evidence regarding the attempted boarding of the Powerful, then they will also need help in locating the witnesses on board that vessel and arranging for their trial testimony in Mombasa.

FUTURE TRAINING NEEDS

¶7. The RLA is providing training and mentoring to Kenyan prosecutors and law enforcement officials. After consulting further with the Kenyans about their needs, the RLA plans to outline a short, intensive capacity building program that likely would benefit from participation of U.S. and UK naval experts, as well as selected international partners within the naval community, to speak on relevant international conventions and anti-piracy operations. Relatively small, brief workshops focusing on practical knowledge and skills development, combined with mentoring on individual cases, are the most effective means of imparting useful knowledge to the Kenyans who will be investigating and prosecuting these cases. The DPP's office could also benefit from the provision of current, relevant resource materials and internet access.

(Note: USAID/Kenya provided new computers to the DPP several years ago, but the GOK has not funded internet access. End note.)

¶8. It may also be useful to invite a select group of Tanzanians to participate in proposed anti-piracy training. The Kenyan and Tanzanian criminal justice systems are similar, and joint participation may create some useful synergies. The RLA has met with Tanzania's chief prosecutor and has provided other training to Tanzanian prosecutors in the past. If the United States is going to seek an MOU with the GOK regarding the transfer of piracy suspects, post recommends consideration of a similar agreement with the government of Tanzania if its penal code permits such prosecutions. This could potentially open up another viable avenue for the disposition of international piracy cases, although Tanzania's maritime and law enforcement capacity is arguably less than Kenya's at this time.

¶9. The UN Office on Drugs and Crime (UNODC) has circulated a draft proposal outlining a broad program of capacity building for countering piracy in the Horn of Africa. The proposal requests over \$1.3 million in the next five months to review and develop the legal frameworks of Kenya, Djibouti, Yemen, and Tanzania to prosecute pirates. Although these countries' capacity to deter, arrest, prosecute and detain pirates needs development, the provision of too much assistance too quickly will overwhelm the ability of the recipients to benefit from it. The United States and its partners should coordinate their efforts closely and should be judicious in providing

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support.

SHIPRIDER AGREEMENTS

¶10. The UNODC proposal also outlines a plan to recruit and train "shipriders" that would operate under shiprider agreements between countries in the region and countries operating anti-piracy patrols. The shiprider agreements are intended to provide a basis for the accepting/prosecuting country to exercise criminal jurisdiction, and, theoretically, to facilitate a simpler, more effective law enforcement operation. However, it is not clear that either purpose would be well served in the Kenyan context.

SHIPRIDER JURISDICTION ISSUES

¶11. Under its current legal framework, Kenyan courts have already asserted jurisdiction over piracy suspects apprehended in international waters by third parties. Therefore, there is no need for a shiprider agreement to establish jurisdiction. According to the Director of the Kenya Police Service Criminal Investigation Division, Kenyan law enforcement officers do not have authority to operate outside Kenyan territorial waters. (Note: A search of relevant Kenyan laws, including the Police Act, failed to verify this assertion, and one prosecutor avers that Kenyan citizens can make an arrest anywhere that Kenyan law offers jurisdiction. End note.) Special legislation might be required to establish and legitimate a Kenyan shiprider regime, and that legislation might need to provide for extraterritorial powers. Given the limited number of trained maritime personnel in Kenya, shipriders likely would be drawn from the Kenya Police Service.

¶12. The appellate court now reviewing the 2006 convictions of the Somali pirates, who are challenging their convictions on jurisdictional and other grounds, may conclude that Kenya's piracy statute is insufficient to support jurisdiction in cases with no Kenyan nexus. In that case, Kenya would need to amend the piracy statute. Such an amendment should be relatively easy to craft and enact; amending the criminal code to allow for a shiprider regime with extended jurisdiction for police officer might be much more difficult. While post would recommend the amendment of the piracy

statute at some point to clarify certain issues (definition of piracy, clearer assertion of jurisdiction and/or incorporation of relevant international legal instruments), the timing of any legislative initiative, including one related to shipriders, must be carefully considered. Such an initiative might unnecessarily or prematurely highlight the weaknesses of the piracy statute before Kenyan courts have spoken definitively on the subject.

SHIPRIDER OPERATIONAL ISSUES

¶13. The seizure and transfer of piracy suspects in 2006 by the United States and last month by the UK were not error free. However, it is unlikely that either of these cases would have been better handled by Kenyan law enforcement officers operating on board those ships. If, in the future, naval personnel are provided with a common set of SOPs that take Kenyan criminal practice into account, many potential issues stemming from naval personnel's lack of familiarity with the Kenyan legal system should be resolved. This simple remedy avoids the costs and logistical problems associated with shipriders (salaries, food, medical care, accommodation, transport, etc.)

¶14. A further practical problem associated with a Kenyan shiprider program might be Kenya's generally rigidly enforced requirement that a suspect must be charged and presented before a magistrate within 24 hours of being in law enforcement custody. This right of prompt presentment is not

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limited to Kenyan citizens. One must assume that, if a Kenyan shiprider took custody of a suspect at sea, the 24 hour clock would start. If the shiprider tried to avoid this time limit by not taking "official" custody of the suspect, this would defeat the purpose of having the shiprider on board.

COMMENT

¶15. The primary and most immediate practical issue facing the prosecution in this and future cases remains arranging for the trial testimony of foreign national eyewitnesses. Apparently because the defendants in this case were denied bail, the Mombasa court has set an expedited calendar for disposition of the case. However, it is unrealistic to expect that the prosecution will have the foreign national witnesses (Yemeni, British, and perhaps Danish) ready to testify beginning January 14. Although some testimony might be taken starting on that day, a further continuance undoubtedly will be required.

¶16. The UK had indicated willingness to assist in locating and, possibly, transporting to the trial some of the witnesses for this case. Given that Kenyan trials are frequently interrupted and do not usually progress quickly, contingency plans for providing accommodations for witnesses in Mombasa will also have to be made. Even "high priority" cases can be continued often and can take months to complete. To the extent that additional practical support for this prosecution is needed, and if the UK cannot meet the need, the United States may be called upon to assist. Post recommends that we provide such assistance, as appropriate, because of our strong national interest in seeing Kenya successfully prosecute this and future cases, and also because we may need similar assistance from the British and other partners in the future. End comment.

RANNEBERGER